

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENJAMIN SMALLS,

Petitioner,

-v-

WILLIAM LEE, Superintendent, Green Haven
Correctional Facility,

Respondent.

Case No. 12-CV-2083 (KMK)

ORDER ADOPTING REPORT AND
RECOMMENDATION

KENNETH M. KARAS, District Judge:

On July 24, 2012, Magistrate Judge Smith entered a Report & Recommendation (“R&R”) recommending that this Court deny Respondent’s motion to transfer this Petition to the Second Circuit, as a second successive petition, under 28 U.S.C. § 2244(b)(3). (R&R 11(Dkt. No. 20).) In the R&R, Magistrate Judge Smith provides notice that objections to her conclusions were due within 17 days, and that failure to object would constitute a waiver of appellate review of any order of judgment later entered. (*Id.* at 12.) Respondent has no objections. (Dkt. No. 21.) Petitioner has no objections to Magistrate Judge Smith’s recommendation of a denial of the motion to transfer this Petition. (Petitioner’s Objection to R&R 5 (Dkt. No. 22).)¹

¹ Citing the federal “contemporaneous objection rule” and the “Rule 5 order,” Petitioner only objects to Magistrate Judge Smith’s recommendation that Respondent be allotted 45 days to serve and file an answer to the Court’s Order. (Objection to R&R 5.) The Court finds these objections to be irrelevant to the merits of Respondent’s motion and without any legal basis.

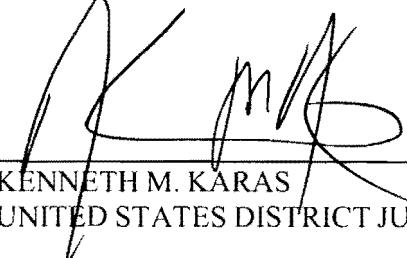
When no objections are filed, the Court reviews an R&R on a dispositive motion for clear error. *See Eisenberg v. New England Motor Freight, Inc.*, 564 F. Supp. 2d 224, 226 (S.D.N.Y. 2008). The Court has reviewed the R&R and finds no error, clear or otherwise. The Court therefore adopts the R&R in its entirety, and it is hereby

ORDERED that the motion to transfer this Petition to the Second Circuit is DENIED.

Respondent is directed to serve and file an answer, along with appropriate state court records, within 45 days of this Order. Petitioner is directed to serve and file any reply within 30 days of the filing of the answer.

A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *Lucidore v. N.Y. State Div. of Parole*, 209 F.3d 107, 111-12 (2d Cir. 2000). In addition, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith. *See* *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

DATED: White Plains, New York
September 20, 2012



KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE